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No. 129

IN THE

Supreme Court of the United States

October Term, 1950

CHARLES R. ALLEN, INC., GREEN BROTHERS, INC., T. W. HOLT & Co. and RICO PRODUCTS CO.,

Petitioners,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF

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IN THE

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CHARLES R. ALLEN, INC., GREEN BROTHERS, INC., T. W. HOLT & Co. and RICO PRODUCTS CO.,

Petitioners,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioners, Charles R. Allen, Inc., Green Brothers, Inc., T. W. Holt and Company and Rico Products Company, pray that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in Charles R. Allen, Inc., *et al.*, Customs Appeal No. 4621, entered February 2, 1950, which reversed a unanimous judgment of the United States Customs Court in favor of Petitioners rendered March 2, 1949 (R. 238-249).

Opinions Below

The opinion of the trial Court in favor of plaintiffs (Petitioners herein) (R. 238-248), is reported in C. D. 1162, Volume *84* United States Treasury Decisions, page *13*. (Issue of March 11, 1949.)

The opinion of the Court of Customs and Patent Appeals, adverse to both the plaintiffs and to the defendant as well, is reported as C. A. D. *428* and appears in the semi-monthly Treasury Decisions (issue of April 13, 1950) in Volume *85* No. *15*, pages *42 to 56*.

Jurisdiction

The judgment of the United States Court of Customs and Patent Appeals was entered on February 2nd, 1950 (R., p.).

Petition for rehearing was denied March 31st, 1950.

This Petition is filed under Rules 42 and 38 of the Rules of this Court, and pursuant to Section 2101 (c), Chapter 133, Public Law 773, 80th Congress, Title 28, Judiciary and Judicial Procedure, of the United States Code, and pursuant to Section 1256, Title 28, United States Code, which provides that

> "Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari."

Statutes Involved

The statutes involved are:

1. Public Law 504 (58 Stat. 817), of the 78th Congress.
2. Sections 514 and 515 of the Tariff Act of 1930 (U. S. C. Title 19, Sections 1514 and 1515, 46 Stat. 734), and
3. Title 1, Agricultural products and provisions, Schedule 7, Paragraphs 758, 761 and 1559 of the aforesaid Tariff Act of 1930 (Public Law 361, H. R. 2667, 1930).

These statutes are set forth in the appendix hereto.

Also involved, as set forth in the Appendix herein is the Cuban Reciprocal Trade Agreement of August 24, 1934, and subsequent amendments thereto, published as T. D. 47232, reported in Volume *66* of Treasury Decisions at page *189*.

Statement

During the years 1945, 1946 and 1947, Petitioners imported merchandise from Cuba which is admitted by all concerned in this litigation to be shredded coconut meat. Said shredded coconut meat was assessed for duty by the Collector of Customs at Tampa, Florida, as

> "Edible nuts, not specially provided for, * * * pickled, or otherwise prepared or preserved, and not specially provided for, 35 per centum advalorem; * * *."

under Paragraph 761 of the Tariff Act of 1930, less a Cuban differential allowance of 20%.

Sections 514 and 515 of the Tariff Act of 1930, *supra*, grant importers of merchandise into the United States the right to judicial review of all decisions of Collectors of Customs, including the validity of all orders and findings entering the same as to the rate and amount of duties chargeable to imported merchandise.

Petitioners filed protests under said Section 514, contending that said shredded coconut meat should have been admitted duty free under the provisions of a Special Act of Congress, enacted December 20th, 1944 and known as Public Law 504 (58 Stat. 817), T. D. 51773. Congress specifically directed in said Act that during the War Emergency period (in this instance between December 20, 1944 and September 7, 1947), shredded coconut meat classifiable under Paragraph 758 of the Tariff Act of 1930, should be admitted free of duty.

All of the involved merchandise was imported during that period (R. 241).

Paragraph 758 of the Tariff Act of 1930, so far as is pertinent to this legislation reads:

> "* * * coconut meat, shredded and desiccated or similarly prepared, 3½ cents per pound."

A further alternative claim was made by Petitioners in their protests (R. 240) that if the merchandise was not dutiable under the provisions of Paragraph 758, or free of duty under Public Law 504, none the less duty should be assessed under the provisions of Paragraph 1559, otherwise known as the "similitude paragraph" of the Tariff Act of 1930.

Petitioners further claimed in their protests that under the Cuban Trade Agreement enacted August 24, 1934, and amendments subsequent thereto (T. D. 47242), importations from Cuba were entitled to preferential treatment.

The three judges of the Third Division of the United States Customs Court who passed upon the evidence and law in the case unanimously sustained the protests in favor of the Plaintiffs (Petitioners herein), and held that the involved importations of said shredded coconut meat from Cuba were entitled to entry free of duty by virtue of the Act of Congress known as Public Law 504 (R. 238-248).

The United States, defendant in the lower Court, appealed said decision to the United States Court of Customs and Patent Appeals which Court reversed the unanimous judgment of the three judges constituting the trial court of the United States Customs Court, but nevertheless, declined to follow the classification made by the Collector under Paragraph 761 of the Tariff Act of 1930.

As the matter now stands, despite extensive litigation by Petitioners in three cities in Florida resulting in the taking of hundreds of folios of testimony from 17 witnesses, no one (neither importers nor Customs officials) can tell from the Appellate Court's decision how the merchandise should be classified.

If ever a case called for correction by certiorari, it is this case.

Questions Presented

1. Should the United States Supreme Court permit to stand without review an anomaly in the law arising from the decision appealed from where, although the United States Court of Customs & Patent Appeals has stated on the one hand that it did *not* approve of the classification by the Collector of Customs in this controversy which had resulted in Petitioners herein having to pay approximately a quarter of a million ($250,000) dollars in customs duties, yet on the other hand it has reversed a unanimous decision by three judges of the United States Customs Court which not only had held on the one hand said Collector's classification was erroneous, but which, on the other hand, had further held that Petitioners were correct in their claim that they should not have been required to pay one cent in customs duties on said importations? (Record, pages 238, *et seq.*).

2. Has not the United States Court of Customs and Patent Appeals in the case at bar undoubtedly overlooked or misinterpreted the purport of applicable decisions by the United States Supreme Court (cited in the annexed Brief) to such an extent as to call for this Court's right of supervision?

3. Does not compliance with the Cuban Reciprocal Trade Agreement (T. D. 47232) require Customs officials and the Customs Courts to grant preferential treatment to shipments from Cuba of shredded coconut meat to the United States?

4. Is not the merchandise involved herein (shredded coconut meat) entitled to entry free of duty under the provisions of Public Law 504 (58 Stat. 817, T. D. 51173) of the 78th Congress or dutiable under Paragraphs 758 or 1559 of the Tariff Act of 1930 and should not the quarter of a million dollars improperly collected from the Petitioners be returned to them?

Reasons for Granting Writ

Because the chief sources of supply of coconut meat—the Philippine Islands and Ceylon—had been cut off from the United States during the late War, Cuban manufacturers of shredded coconut meat were encouraged to produce, and American food dealers were induced to import, shredded coconut meat urgently needed as food not only by the civilian population of the United States but by the armed forces as well. In support of this statement please see letters from Marvin Jones, War Food Administrator; Henry L. Stimson, Secretary of War; James V. Forrestal, Secretary of Navy; E. R. Stettinius, Acting Secretary of State (R. 222-225). Said letters show why Congress enacted said Public Law 504 (R. 240).

As a special inducement to encourage shipments of this food stuff through the submarine and floating mine infested waters of the Caribbean Sea, the Gulf of Mexico, and the waters off the southern part of the United States, the 78th Congress on December 20th, 1944, passed a Special Act (H. R. No. 1033), known as Public Law 504, which provided for entry free of duty of coconuts and shredded coconut meat into the United States, during an Emergency Period extending from December 20th, 1944, until such time as the President of the United States should determine had ceased and which by Executive Order (T. D. *51807*) was September 7, 1947.

Petitioners contend that in enacting Public Law 504 Congress manifestly intended to provide for free entry of shredded coconut meat used in making cakes, pies, candy and ice cream during the aforesaid Emergency War Period, and that therefore it was error for the United States Court of Customs and Patent Appeals to hold that the instant importations of shredded coconut meat admittedly so used were not entitled to the benefit of entry free of duty under said Public Law 504.

The United States Court of Customs and Patent Appeals in the instant case has reversed a unanimous decision of three judges of the United States Customs Court which had held that this foodstuff was entitled to entry free of duty under said Public Law 504 (R. 248).

By such reversal the United States Court of Customs and Patent Appeals has failed not only to comply with the provisions of the Special Act of Congress (Public Law 504) but, quite obviously, in holding it neither approved of the classification by the Collector of Customs of said merchandise with a duty of 28%, nor with the unanimous decision of the Trial Court that the merchandise was duty free, and in failing to state under what paragraph of the Tariff Act such merchandise should be classified and in failing to invoke the legal doctrines of classification by use or classification by similitude, it has placed the classification of said merchandise in what might be called a "legal vacuum."

Certainly, when Congress enacted the Tariff Act of 1930 and Public Law 504 of the 78th Congress it was not enacting any "legal vacuums." Paragraph 1559 of the Tariff Act is absolute authority for this assertion.

This "legal vacuum" has been court created because in the instant case the Court of Customs and Patent Appeals has ignored important questions of tariff construction in such a way as to conflict with applicable tariff decisions by the United States Supreme Court

(a) on the law of "classification by use;"

(b) on the doctrine of "similitude" legislatively asserted in said Paragraph 1559;

(c) on the classification of articles not commercially known at the time of the passage of a tariff act; and

(d) on the well-known rule that any ambiguous tariff meaning shall be construed in favor of taxpayers.

We respectfully contend that in creating this "legal vacuum" the Court of Customs & Patent Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

As additional reasons for granting this Writ, Petitioners further respectfully submit it is apparent from the opinion of the Court of Customs Appeals herein that said Court erred:

In denying without opinion on March 31, 1950, Application for Rehearing filed by Petitioners herein of the original decision rendered by the Court of Customs Appeals on February 2, 1950.

In not holding that in Tariff Terminology the word "and" is often used interchangeably for the word "or" or for the punctuation mark "comma", and in ignoring a legislative history of more than fifty years on that very point on the very paragraph under which it is claimed this merchandise was dutiable, and in reversing the unanimous decision of the trial court of three judges on that very point (R. 245, 246).

In overlooking its own two findings in its opinion herein

(a) that "it does not appear that coconut meat sweetened by the use of sugar should be excluded from Paragraph 758 of the Tariff Act of 1930"; and

(b) that "the fact that some desiccated coconut is sweetened, and some unsweetened, while the merchandise at bar is sweetened can have no effect on its classification", and then holding

(c) that because sugar has been used in preserving the imported merchandise (shredded coconut meat) such use of sugar *prevented said mer-*

chandise from being classified under Paragraph 758 aforesaid.

Such holding (c) is so clearly inconsistent with the court's findings under (a) and (b) above, as to be a perfect judicial *non sequitur.*

In citing with approval at top of page 53 of its opinion herein, the rule of *Schoennemann* v. *United States,* 119 Fed. 584 at 587 (which rule was a re-statement of the rule laid down by the United States Supreme Court in *Hartranft* v. *Wiegemann,* 121 U. S. 609, 616), and then holding directly opposite to said rule.

In failing to refer in its opinion to the advice given to the 78th Congress immediately prior to the enactment of Public Law 504 as to the necessity for such legislation as expressed in letters to Congress by the Department of State, the War Department, the Navy Department and the War Food Administrator (R. 222-226).

In holding that the material imported "wet shredded coconut meat" was identical to "dry shredded coconut meat", and because it was "identical" then the doctrine of similitude could not be applied.

In not holding that if the involved merchandise was identical in material to the merchandise named in Paragraph 758, it naturally followed that being identical it was subject to the rate of duty provided for therein.

In not holding that it could not possibly have been the intent of Congress to impose a high rate of duty on wet shredded coconut meat, when the country was starving for coconut meat, while dried shredded coconut meat *used for identical purposes and costing more to produce* came in free of duty.

In holding that the imported merchandise was both an "enumerated" and a "non-enumerated" article,

an obviously inconsistent holding in Tariff interpretation.

In overlooking the concession by the United States, Respondent herein, in its Brief before the Court of Customs and Patent Appeals that "desiccated" meant "preserved." Not only did they concede it they cited cases to support said concession (pp. 6, 22 of said Brief).

In holding that the words "or similarly prepared" in Paragraph 758 of the Tariff Act of 1930, which, so far as pertinent to this case, reads

> "* * * coconut meat, shredded and desiccated, or similarly prepared * * *

meant the shredded coconut meat must in all cases be desiccated. If such holding were correct then the words "or similarly prepared" are superfluous and tautological for under that holding all coconut meat in that paragraph would have to be desiccated, and if that were true why add the words "or similarly prepared"?

In finding and holding that the method of preparation of dry shredded coconut meat was "opposite" to the method of preparation of wet shredded coconut meat which was directly contrary to the uncontradicted evidence in the case, and in overlooking decisions by the United States Supreme Court in *Schmeider* v. *Barney,* 113 U. S. 645 at 647, and in *Greenleaf* v. *Goodrich,* 101 U. S. 278 at 283, to the effect that for preparations to be similar does not mean they have to be *identical.*

In not holding that as the imported shredded coconut meat was *used* identically for the same purposes as the shredded coconut meat named in Paragraph 758, it had to take the same rate of duty as such shredded coconut meat in said Paragraph 758, assuming, but not conceding, the importations were not embraced

under the original terms of Paragraph 758, and assuming, but not conceding, Congress in passing Public Law 504 was unaware of the commercial existence of the imported shredded coconut meat.

In holding that "Trade Understanding" (another term for commercial designation) can be established by legislative history when there was no legislative history of the imported merchandise for the all-sufficient reason that the imported merchandise was not in existence or known in the commerce of the United States until 14 years after the passage of the Tariff Act of 1930.

In not holding that "Trade Understanding" can be established only by competent testimony from witnesses in such trade.

In holding that the doctrine of "classification by use" could not be applied to merchandise similar or identical to material *eo nomine* provided for in a Tariff Act, thus attempting to abolish the provisions of Paragraph 1559 of the Tariff Act of 1930, and thereby indulging in judicial legislation.

In failing to apply to the instant merchandise the doctrine of similitude by use specifically provided for in Paragraph 1559 of the Tariff Act, under which Petitioners made an alternative claim; said Paragraph providing

> That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture, or the use to which it may be applied to any article enumerated in this Act is chargeable with duty, shall be subject to the same rate of duty which is levied on the enumerated article which it most resembles in *any* of the particulars before mentioned; * * * (italics ours).

A list of the decisions by this Court on the application of terms used in tariff legislation and customs jurisprudence are noted below, and are concisely referred to in the attached brief.

A.

As to the meaning of the tariff terms "Similitude" and "Classification by Use," Petitioners contend that in the instant case the Court of Customs and Patent Appeals has apparently overlooked or misapprehended this Court's decisions in

Greenleaf v. *Goodrich,* 101 U. S. 278;
Arthur v. *Fox,* 108 U. S. 125;
Schmeider v. *Barney,* 113 U. S. 645 at 647;
United States v. *Downing,* 201 U. S. 354;
United States v. *Eckstein,* 222 U. S. 130;
Rice v. *United States,* 257 U. S. 536.

All of which decisions support Petitioners' position as to the meaning of the Tariff terms "Similitude" and "Classification by Use."

B.

As to the classification of articles not commercially known at time of passage of a tariff law, Petitioners contend that in the instant case, the Court of Customs and Patent Appeals has apparently overlooked or misapprehended this Court's decisions in

Newman v. *Arthur,* 109 U. S. 132;
Pickhardt v. *Merritt,* 132 U. S. 252 at 257;
Hedden v. *Robertson,* 151 U. S. 520 at 525.

which decisions we submit support Petitioners' position on this Tariff terminology.

C.

As to the fundamental rights of taxpayers under the Constitution of the United States, Petitioners contend that in the instant case the Court of Customs and Patent Appeals has apparently overlooked or misapprehended the rulings of the Supreme Court of the United States on the proposition that "ambiguous tariff meanings shall be construed in favor of taxpayers", as expounded in

Hartranft v. *Wiegemann*, 121 U. S. 609, 616;
Benziger v. *U. S.*, 192 U. S. 38, 55;
Swan & Finch Co. v. *U. S.*, 190 U. S. 143.

all of which decisions Petitioners submit support their contentions herein.

D.

As to the intent of the Cuban Reciprocal Trade Agreement of August 24, 1934, and subsequent amendments thereto, Petitioners contend that in the instant case the Court of Customs and Patent Appeals has apparently overlooked or misapprehended the ruling of the Supreme Court of the United States on the proposition that the provisions of all Treaties should be liberally construed, as enunciated in

Factor v. *Laubenheimer*, 290 U. S. 276.

E.

As to the establishment of "Trade Understanding", referred to in Syllabus No. 2 of the Court of Appeals decision, and which "Trade Understanding" is only another term for "commercial understanding" or "commercial designation", the Court of Customs Appeals states it, the Court, has done this through its alleged legislative history

on alleged "trade Understanding", we submit it is elementary, as shown by decisions cited in the attached brief, that there is only one legal method for establishing "commercial designation", or "commercial understanding" or "trade understanding" and that is *solely and exclusively* by the testimony of competent commercial or trade witnesses—and not by judicial notice or alleged legislative history of trade understanding.

The Government failed to call a single witness to give evidence on a single fact in the case.

How then could "trade understanding" be established?

Conclusion

Every one of the seven judges who passed upon the Collector of Customs classification of the involved merchandise agreed that said classification was erroneous.

This erroneous classification resulted in taking from the Petitioners herein approximately a quarter of a million dollars in customs duties.

For the reasons heretofore set forth and amplified in the annexed brief, the Petition for a Writ of Certiorari should be granted.

Dated, May 18, 1950, New Smyrna Beach, Fla.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Facts

In our Petition for a Writ of Certiorari annexed hereto, we have sketched briefly the background of this case under the headings "Questions Presented" and "Reasons for Granting Writ."

All of the evidence in this controversy was adduced by Petitioners (Plaintiffs) in the trial of the case in West Palm Beach, Miami and Tampa, Florida, where their seventeen (17) witnesses testified. The United States, defendant at said trials, failed to offer the testimony of a single witness.

Hence, the following facts were established without contradiction:

1. The sources of supply of dry preserved shredded coconut meat (Ceylon and the Philippine Islands) were shut off from this country by the Japanese occupation and blockade of the Orient at the time Congress passed the Emergency remedial legislation known as Public Law 504.

2. The only readily available sources of supply of shredded coconut meat during said Emergency period were the Island of Cuba and the Caribbean area.

3. To encourage the production and importation of shredded coconut meat, Congress by enacting Public Law 504 removed the *ad valorem* import duty on said merchandise, and provided for the admission of shredded coconut meat free of customs duties.

4. Cuba and the Caribbean area had little or no facilities for the production and shipment of shredded coconut meat manufactured by the heating and dry sugar process, but it did have adequate facilities for the production and shipment of shredded coconut meat manufactured by the heating and liquid sugar process.

5. The imported merchandise was shredded coconut meat.

6. It was preserved for shipment by the use of liquid sugar and heat.

7. It was used for identically the same purposes as was shredded coconut meat preserved by the use of dry sugar and heat (top of p. 46 of instant opinion).

8. These uses included the making of bakery and confectionery products used in feeding the armed forces of the United States and our civilian population during the war.

9. The shredded coconut meat preserved by the use of liquid sugar and heat cost less to produce than did the shredded coconut meat preserved by the use of dry sugar and heat, despite which the Court of Customs Appeals has held the latter (the dry preserved) which is the more expensive, is entitled to entry free of duty, while the former and less expensive has had to pay a customs duty of 28% *ad valorem*.

POINT I

The failure by the Court of Customs Appeals to even refer in its decision to the fundamental rule in statutory construction that the word "and" is often used interchangeably for the word "or", or interchangeably for the punctuation mark "comma", despite the lowe court's unanimous holding that such was the intent of Congress in Paragraph 758, entitles Petitioners to have said decision reviewed by the Supreme Court of the United States.

Petitioners contended in their Brief before the trial Court where they had a unanimous decision in their favor, and repeated said contention in their Brief filed with the Court of Customs Appeals (at pp. 35, 36, 43-45 thereof), that the words "and" and "or" were used interchangeably and in the place of commas, and *vice versa,* and cited the legislative history of the shredded coconut meat paragraph in support of said contention.

As to such contention, the Trial Court in its unanimous opinion in our favor stated (R. 245):

> "It is also to be observed that paragraph 218 of the act of 1894 provided for 'prepared or desiccated coconut or copra', and the acts of 1897, 1909 and 1913 provided for 'coconut meat or copra. desiccated, shredded, cut, or similarly prepared.' Under these provisions it was not necessary that the coconut meat be both prepared *and* desiccated, or shredded *and* desiccated; coconut meat which had been desiccated or shredded or cut or prepared would fall thereunder." * * * (Italics the Court's.)

Although the Court of Customs Appeals states it has studied the legislative history of "Trade Understanding", which we have shown in Point V, *infra,* has nothing to do

with the law in the case, it has evidently failed to study the legislative history bearing upon changes in phraseology and punctuation in paragraphs of tariff acts having to do with shreded coconut meat, which latter legislative history is clearly and concisely recited in the unanimous opinion of the Trial which held in favor of Petitioners (R. 245-246).

This study by the Trial Court goes back more than 100 years—to 1832 to be precise—and we respectfully invite same to this Court's attention, as in two pages it clearly and concisely has analyzed Paragraph 758 while it has taken the Appellate court six pages to render said legislative history thoroughly unclear (pp. 47 to 52 of its opinion).

If one word of comment by the Appellate Court appears in its opinion as to the use of commas, or the interchangeability of the conjunctive words "and" and "or", it has escaped our attention.

Neither is there a single word of comment by the Appellate Court on the trial court's citation of and reliance upon a recent decision by that same Appellate Court (R. 246) of *Pacific Vegetable Oil Company* v. *United States,* 32 C. C. P. A. 68 (C. A. D. 287), on the interchangeability of the words *"and"* and *"or."*

This silence on the part of the Court of Customs Appeals is most significant in view of the fact that the trial court in referring to the rule laid down by the Appellate Court in the *Pacific Vegetable* case, *supra,* on the use of the words *"and"* and *"or"*, stated:

> "Following this line of reasoning, the provision in paragraph 758 for 'coconut meat, shredded and desiccated, or similarly prepared', refers to distinct articles; namely, shredded coconut meat, desiccated coconut meat, and coconut meat similarly prepared" (R. 246).

It is something new in our experience for an Appellate Court to reverse a unanimous decision by a trial court of three judges in a case where the trial court states it is following a specific rule laid down by that same Appellate Court, without having that Appellate Court comment in some way or other—that is, to either say that it has changed its mind, or that the lower court misinterpreted the decision relied upon, or that the facts are distinguishable. But in the decision appealed from and for which writ of certiorari is sought, not one word is stated by the Appellate Court as to its previous expression of opinion in the *Pacific Vegetable* case, *supra,* that

> "throughout the Tariff Act of 1930 the words 'and' and 'or' were frequently used interchangeably to indicate distinct articles; * * *" (R. 246).

The silence by the Court of Customs Appeals on this vital interpretation of Paragraph 758, we respectfully submit is a sound reason for granting the Writ of Certiorari herein applied for.

POINT II

The Court of Customs Appeals in making a negative holding on two affirmative findings committed a judicial *non sequitur.*

A further inconsistency resulted when it referred to a United States Supreme Court decision with approval, and then failed to follow the rule enumerated therein.

The provisions of the Cuban Reciprocal Treaty (T. D. 47232) although raised in Petitioners' Protests against the Collector's Classification were not referred to in the Court's opinion.

As we have previously referred to several other obviously inconsistent findings by the Court of Customs Appeals on pages 8, 9 of our petition for a Writ, we shall discuss them but briefly here.

At page 54 of its opinion the Court of Customs Appeals stated that

> "the fact that some desiccated coconut is sweetened and some unsweetened, while the merchandise at bar is sweetened can have no effect on its classification."

and held that the statement in the lower Court's opinion (R. 247) that it does not appear that coconut meat sweetened by the use of liquid sugar should be excluded from Paragraph 758 of the Tariff Act of 1930 *was a correct statement.*

Despite those findings the Court of Customs Appeals then holds that because sugar has been used in preserving the imported merchandise (shredded coconut meat) such use of sugar *prevented* said merchandise from being classified under Paragraph 758.

This process of reasoning we respectfully suggest might rightfully be called a "judicial non-sequitur."

Another inconsistency by the Court of Customs Appeals in this controversy appears on page 53 of its opinion herein, where although it cited with approval the rule of *Schoennemann* v. *United States,* 119 Fed. 584, 587 (which rule was a re-statement of the rule laid down by the United States Supreme Court in *Hartranft* v. *Wiegemann,* 121 U. S. 609, at 616), the Court of Customs Appeals *held directly contrary to the rule laid down by the Supreme Court.*

As the Court of Customs Appeals rejected the classification by the Collector under Paragraph 761 of the Tariff Act of 1930, and has failed to indicate how the importations should be classified, there would seem to be a doubt in the mind of the Court of Customs Appeals as to how the importation should be classified.

We are constrained to say that having such doubt it should have followed the rule referred to with such evident

approval, laid down by this court in the *Hartranft* case *supra,* to-wit:

> "if the question were one of doubt the doubt would be resolved in favor of the importer, as duties are never imposed upon a citizen upon vague or doubtful interpretation."

In the minds of the Petitioners, their attorney, and the three judges of the United States Customs Court who decided the instant case, there was not the slightest doubt but that the imported merchandise was entitled to entry free of duty for any one of three, *if not all three, reasons,* to wit:

(1) the intent of Congress under Public Law 504;

(2) under the plain provisions of Paragraph 758;

or,

(3) failing either, under the provisions of paragraph 1559 of the tariff act.

Other decisions by the United States Supreme Court upholding the principle of law that ambiguous tariff meanings shall be construed in favor of taxpayers are expounded in

Benziger v. *United States,* 192 U. S. 38, 55;
Swan & Finch Co. v. *United States,* 190 U. S. 143 at 146.

We chose to believe that this is still the law in the United States, even though it may not be the law in other parts of the world.

Moreover, as these were importations from Cuba it is obvious that the Reciprocal Treaty with Cuba (Appendix p. 38) shows an intent on the part of the United States to construe liberally any tariff provision affecting imports from Cuba.

Factor v. *Laubenheimer,* 290 U. S. 276.

That fact apparently was not considered by the Appellate Court in reversing the unanimous decision of the Trial Court which had held said importations were entitled to entry free of duty.

We are aware that it may be argued the importations were allowed the 20% preferential set forth in said Cuban Treaty. It is our position that over and beyond the 20% Preferential it was the intent of Congress through this Cuban Treaty to provide that if there were any doubt in interpreting the tariff provisions on entries from Cuba, such doubt was to be resolved in favor of the Cuban importations.

Factor v. *Laubenheimer*, 290 U. S. 276.

POINT III

In reversing the unanimous decision by three judges of the Trial Court, which held that the imported shredded coconut was duty free by virtue of the Provisions of Paragraph 758, the Appellate Court has not only made contradictory or inconsistent findings in its opinion, but it has apparently overlooked decisions of the Supreme Court, as well as overlooked prior decisions of its own, on applicable principles of law.

In our previous point we have discussed briefly several inconsistencies apparent in the decision of the Court of Customs Appeals.

It has likewise overlooked pertinent Supreme Court decisions on "similarity of preparation" and "similitude."

In Syllabus No. 3 of its instant opinion the Court of Customs Appeals holds the involved merchandise cannot come under Paragraph 758, which paragraph reads (R. 240):

"Par. 758. Coconuts, one-half of 1 cent each, coconut meat, shredded and desiccated, or similarly prepared, 3½ cents per pound."

In the middle of page 53 of the instant opinion it does find, and we quote:

"In the case at bar, the imported merchandise is shredded coconut. The material covered by paragraph 758 is shredded coconut."

However, its further comments on the construction it gives to Paragraph 758 in discussing "desiccated", similitude" and "opposite methods of preparation" (appearing on pp. 51 to 54 of its opinion), are inconsistent and the cases cited in support of such discussion clearly irrelevant.

As an illustration, we invite attention to the bottom of page 52, where in referring to the "similitude" provisions of the tariff act (Paragraph 1559 thereof), the Court says:

"it does not require that the resemblance be in all four of the particulars stated in the statute—material, quality, texture and use—*substantial similarity in one* being sufficient." (Italics added.)

Downing v. *U. S.*, 201 U. S. 354 at 355.

The opinion (top of p. 46) cites the uncontradicted evidence of more than a dozen witnesses that the use of the two variations of shredded coconut meat—the dry processed and the wet processed—are the same, *which "similarity by use" of and in itself was alone sufficient to subject the importations to the provisions of Paragraph 1559,* assuming, without for one minute conceding that the merchandise was not properly dutiable either under the provisions of Paragraph 758 or under the provisions of Public Law 504.

It is therefore obvious the Appellate Court has overlooked the fact that by establishing "similarity by use" Petitioners were entitled to the benefit of classification by similitude under Paragraph 1559.

Arthur v. *Fox,* 108 U. S. 125.

On page 53 of its opinion the Appellate Court says:

> "The material being identical, the rule of similitude does not apply."

This is another judicial *non sequitur* for the simple reason that it makes no difference in the world if the material is "identical" when petitioners have conclusively established "similarity by use" thereby falling within the Appellate Court's own definition of "similitude", "similarity by use" being one of *any* of four similarities—*i. e.,* material, quality, texture, or *use.*

Arthur v. *Fox,* 108 U. S. 125.

Furthermore, if an article is identical in materal to another (and it must be borne in mind that the Appellate Court has held that the wet shredded coconut meat was *identical* in material with the dry shredded coconut meat) why is not the *wet* shredded coconut meat dutiable at the same rate as the *dry* shredded coconut meat under Par. 1559?

As a matter of fact why should the Appellate Court insist that a product which it says is identical in material and use, and uncontradictedly is shown to cost less to produce than the dry shredded coconut meat, be compelled to pay 28% ad valorem duty, when the more expensive product the Court says is entitled to free entry?

Such holding creates another anomaly in the law sharply criticized by the same Court of Customs Appeals in *Proc-*

tor & Gamble v. *United States,* C. A. D. 345, where that Court unanimously held as to such anomaly

> "it is difficult to believe the Congress intended."

United States v. *Lehman Co., Inc.,* 22 C. C. P. A. 106 (T. D. 47081);
United States v. *Palm, Fechteler & Co.,* 4 C. C. A., 1 (T. D. 33195).

Another anomaly in the instant opinion is to be found on page 53 where the Court finds the imported merchandise is "shredded coconut." Reference to Paragraph 758 shows that "shredded coconut meat" is enumerated therein, which leads to but one inference, to wit; that "shredded coconut meat" is an enumerated article, but the Appellate Court contends that the shredded coconut is not dutiable under Paragraph 758, and in failing to suggest under what Paragraph it should be classified, it is by logical inference holding that "shredded coconut meat" is a *non-enumerated* article; but we have shown how the Appellate Court has held that the material in the imported merchandise is "identical" to shredded coconut meat, and shredded coconut we find is an *enumerated* article—so the Appellate Court in one breath says the imported merchandise is "enumerated" and in the next breath in effect says it is "non-enumerated"—certainly an anomaly if there ever was one.

As further proof of our contention that the Appellate Court was inconsistent in its holding on what is "identical" and what is "similar," attention is directed to its holding in *Conkey & Co.* v. *United States,* 12 C. C. A. 552 at 555, where it stated frozen lamb was dutiable as fresh lamb because

> "If they were of the same material and the same texture, quality and use, they would be the same and would therefore be enumerated."

In that case it held the two products involved (fresh lamb and frozen lamb) were substantially the same in material, but not identical, and applied the doctrine of similitude.

We submit there was no more resemblance between wet and dry shredded coconut meat in the case at bar than there was between fresh and frozen lamb in the *Conkey* case. Yet in the case at bar the Court has held that the wet and dry shredded coconut meat are identical which fact the Court holds *prevents* classification by similitude, whereas in the *Conkey* lamb case it held that fresh and frozen lamb are *not* identical in material and the Court there held that fact *permits* classification by similitude.

We respectfully submit that if fresh and frozen lamb are not identical in material, neither are wet and dry shredded coconut meat identical in material, although, as above stated the Court of Customs Appeals has held the latter so to be.

The Court of Customs and Patent Appeals in the case now before this Court for review, very obviously has overlooked that under the "similitude rule," never up to now abrogated by any Court to our knowledge, the rule unequivocally states that if the merchandise involved is not provided for elsewhere (R. 240) and if the article in question is "similar, either in material, quality, texture or use" (in *any* of those four particulars), it takes the rate of duty on the enumerated article which it most resembles in *any* of the particulars before mentioned.

There is not the slightest doubt that the imported wet shredded coconut meat is used and was used for all the purposes to which dry shredded coconut meat is and was used. Why then, if not squarely dutiable under Paragraph 758 as "identical" material as the Court of Customs Appeals has held it was "identical," should not the im-

ported merchandise be dutiable under the similitude rule of classification by use?

On the other hand, if the material is "identical" with the material in Paragraph 758, especially as it is used for identical, and only identical purposes—or in other words as both species of wet and dry shredded coconut meat are concededly commercially interchangeable, why is it not dutiable under Paragraph 758?

SURELY THE DOCTRINE OF CLASSIFICATION BY USE SHOULD NOT BE ERASED FROM THE STATUTE BOOKS BY JUDICIAL LEGISLATION.

POINT IV

In holding that the method of preparation of wet shredded coconut meat is the opposite to the method of dry shredded coconut meat, the Court of Customs Appeals has not only found contrary to the undisputed testimony on preparation, but it has overlooked a decision by the United States Supreme Court on "similarity of preparation".

Frankly, we believe that up to this point we have shown more than enough reasons to entitle Petitioners to a Writ of Certiorari herein, and that in the interest of brevity and economy we should stop right here, but it may be better to point out additional inconsistencies and omissions which are apparent in even a casual reading of that Court's opinion.

We find in Paragraph 758 of the Tariff Act of 1930 the words "similarly prepared" which we submit are syonymous with "similarly processed" or "similarly manufactured" or "similarly preserved." In that connection, the Court of Customs Appeals at the middle of page 52 of its opinion, with reference to the process of manufacture of the two varieties of shredded coconut meat stated:

"* * * The methods of preparation are very dissimilar—they are opposites."

Such a conclusion is absolutely unwarranted, and clearly unsupported by the uncontradicted evidence given on the methods of preparation or manufacture or preserving of the two varieties of shredded coconut meat as summarized in the following analysis of the record submitted to the Appellate Court in page 10 of our Brief from which we quote as follows:

"The imported wet or moist shredded coconut meat was similarly prepared to the so-called dried shredded coconut meat; both kinds went through a shredding or grating machine; both kinds were cooked, both kinds had sugar added as a preservative, either dry or liquid sugar in the desiccated form and liquid sugar in the wet form; and where the sugar content had been reduced by Government order, other preservative agents in its place were added in *both kinds;* Allen (25, 26, 33, 37, 38); Holt (42); Teijeiro (49-50); Green (62, 64, 65, 78, 82, 83); Schoenfeld (140-142).

Pertinent to the meaning of the words "similarly prepared," is the decision of the United States Supreme Court in *Schmieder* v. *Barney,* 113 U. S. 645, where at page 647 it was held that *"though there were differences in the process of manufacture"* none the less goods intended for the same uses and composed of the same material were of *similar description.* (Italics ours.)

See also:

Greenleaf v. *Goodrich,* 101 U. S. 278, at 283;
American Express Co. v. *U. S.,* 2 C. C. A. 39.

For preparations to be similar does not mean that they have to be identical.

That fundamental truth in customs jurisprudence has been manifestly overlooked by the Court of Customs Appeals in its opinion herein.

Another error by the Court of Customs Appeals was the holding that the words "or similarly prepared" in Paragraph 758 of the Tariff Act of 1930, which, so far as pertinent to this case, reads

> "* * * coconut meat, shredded and desiccated, or similarly prepared, * * *."

meant that the shredded coconut meat must in all cases be *"desiccated."*

If such holding were correct than manifestly the words "or similarly prepared" are superfulous and tautological because under such a holding *all coconut meat in that paragraph would have to be "desiccated," and if that were true why add the words "or similarly prepared" after the word "desiccated."*

In construing a statute a sensible construction should obtain, one that is in harmony with the purpose of its enactment, and will, if possible, avoid an unjust and absurd conclusion.

> *Heide* v. *United States,* 2 C. C. A. 399, T. D. 32166; *Proctor & Gamble* v. *United States,* 19 C. C. A. 415.

Furthermore, the Court of Customs Appeals has overlooked the concession by the United States, respondent herein, in its brief before that Court that "desiccated" meant "preserved." Not only did they concede it they cited cases to support their concession (pp. 6 and 22 of said brief).

With such a concession before them, by what process of reasoning does the Court of Customs Appeals contend that the words "or similarly prepared," referred to above, can mean only "desiccated."

POINT V

The opinion of the Appellate Court we are seeking to have reviewed was not only erroneous and contradictory on its face but it overlooked or misapprehended decisions by the Courts on fundamental questions of customs jurisprudence. Especially is this true in connection with so-called "trade understanding".

It must be borne in mind that the decision of the Court now under consideration stated the Court did *not* approve of the Collector's classification of the shredded coconut meat involved in these importations at 28% *ad valorem*—neither, for that matter did the Trial Court which unanimously held that the imported shredded coconut meat was entitled to entry free of duty. We thus in effect have a result where seven judges have held the collector of customs erroneously took a quarter of a million of dollars in customs duties from the Petitioners in assessing such imports at 28% ad valorem and where the three judges of the trial Court have unanimously held said shredded coconut should have come in free of duty.

"Trade Understanding of Paragraph 758" (Syllabus No. 2 of C. A. D. 428), is one of the reasons advanced for the Appellate Court's reversal of the unanimous finding of the three trial judges that this merchandise was entitled to free entry.

We emphasize with all the vigor possible that the Government did not offer a single word of evidence either by word of mouth or document of any so-called "trade understanding", and we repeat it did not call a single witness during the entire three days of trial.

The Court says that "trade understanding" was established by "legislative history."

That statement is clearly erroneous for two reasons:

First: "Trade understanding" is merely another term for "commercial designation," and "commercial designation" obviously can be established *solely and only* by persons dealing *commercially* with the product which may be the subject of litigation.

Akeroyd & Co. v. *United States,* 15 C. C. P. A. 440.

The Court may not take judicial notice of commercial designation. It must be proved by evidence.

U. S. v. *Borgfeldt,* 1 C. C. A. 255.

The question of commercial designation is established solely upon the evidence and is not subject of judicial knowledge.

U. S. v. *Goldberg's Sons,* 3 C. C. A. 282;
U. S. v. *Raunheim,* 18 C. C. P. A. 19.

There is no presumption of commercial designation continuing from one tariff act to another.

U. S. v. *Raunheim, Inc.,* 17 C. C. P. A. 425;
U. S. v. *Reiss Co.,* 18 C. C. P. A. 159.

Second: The imported merchandise was concededly not commercially in existence until 1944. This fact was admitted by counsel for the Government on pages 24 and 25 of its Brief filed with the Appellate Court, so how could it have a "legislative history," when Public Law 504 wasn't introduced as H. R. #1033 until *1943* (R. 222) and not passed until 1944?

From its statements on page 56 of C. A. D. 428, the decision here under discussion, it is quite apparent that the Court of Customs Appeals is confused as to the distinction to be given to the "commercial designation" or the "trade understanding" and the "common meaning" of tariff terms.

The two following excerpts from said page 56 support our criticism. Said the Court:

> "* * * The requirement was that the later originating products be commercially known by the tariff designation," * * * and
> "* * * it is necessary that the later originating merchandise be known in the language of commerce by a term which brings it fairly and clearly within the meaning and classification of *the tariff term as commonly or commercially understood.*"

How can "trade understanding" or "commercial designation" have any effect on merchandise the existence of which *as in the case here* was not known at the time of the passage of the Tariff Act, when the cases uniformly hold that "commercial designation" must have been applied to merchandise under a definite, uniform and general term in the wholesale trade of the United States *prior to the enactment* of the particular tariff act controlling the classification of the imported merchandise?

> *U. S.* v. *Field & Co.*, 10 C. C. P. A. 183;
> *Akeroyd & Co.* v. *United States*, 15 C. C. A. 440;
> *U. S.* v. *Schneider Bros. & Co.*, 15 C. C. A. 16.

It is axiomatic that "tariffs are made for the future as well as for the present."

> *Hedden* v. *Robertson*, 151 U. S. 520 at 525;
> *United States* v. *Sehlbach*, (C. C. A. 2d) 90 Fed. 798;
> *Newman* v. *Arthur*, 109 U. S. 132;
> *Pickhardt* v. *Merritt*, 132 U. S. 252 at 257;
> *Chicago Mica Co., et al.* v. *U. S.*, 21 C. C. P. A. 401, T. D. 46927;
> *U. S.* v. *Paul G. Downing, et al.*, 16 C. C. A. 556, T. D. 43294.

And how could Tariff Acts "be made for the future", as well as for the present (as per the preceding five cited cases), if we had to classify merchandise according to how it was known *prior* to the enactment of a Tariff Act if such merchandise was not known to exist *prior* to such enactment. We repeat that The Assistant Attorney General in his brief before the Court of Customs Appeals (p. 25 thereof) conceded the involved merchandise *was not commercially known* prior to 1944.

From the foregoing analysis of the principles of "trade understanding" it is perfectly obvious the reversal of the unanimous decision in favor of the Petitioners because of an alleged "trade understanding" impossible to prove is wholly without merit, and hence the decision by the Court of Customs Appeals should be reviewed by the Supreme Court.

Conclusion

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted on the facts, the law and the arguments set forth in this brief and the accompanying Petition.

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Attorney for
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T. W. Holt & Company,
Rico Products Company,
Petitioners.

Dated at New Smyrna Beach, Florida, June , 1950.

Appendix

STATUTES INVOLVED

1. Par. 758, Tariff Act of 1930, Title 1, Schedule 7, Public Law 361, H. R. 2667 (R. 240)

   Coconuts, one half of 1 cent each; coconut meat, shredded and desiccated, or similarly prepared, 3½ cents per pound.

2. Par. 761, Tariff Act of 1930, Title 1, Schedule 7, Public Law 361, H. R. 2667 (R. 240)

   Edible nuts, not specially provided for, * * * pickled, or otherwise prepared or preserved, and not specially provided for, 35 per centum ad valorem; * * *.

3. Par. 1559, Tariff Act of 1930, Title 1, Schedule 7, Public Law 361, H. R. 2667 (R. 240)

   That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture, or the use to which it may be applied to any article enumerated in this Act is chargeable with duty, shall be subject to the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; * * *.

4. Section 514, Tariff Act of 1930 (U. S. C. Title 19, Section 1514, 46 Stat. 734.)

   Protest Against Collector's Decisions.

   Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties

chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of any entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation.

5. Section 515, Tariff Act of 1930 (U. S. C. Title 19, Section 1515, 46 Stat. 734.)

Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in

part and thereafter remit or refund any duties, charge or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision. If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against his modification of any decision, and, in the case of merchandise entered for consumption, if all duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law.

6. Judicial Code, Title 28, Section 1256

"Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by Writ of Certiorari."

Miscellaneous

1. Public Law 504—(58 Stat. 817, T. D. 51173) (R. 240)

• • • That no duty shall be levied, collected, or payable under the Tariff Act of 1930, as amended,

with respect to coconuts or coconut meat provided for in paragraph 758 of that Act, entered, or withdrawn from warehouse, for consumption, during the period beginning with the day following the date of enactment of this Act and ending with the termination of the unlimited national emergency proclaimed by the President on May 27, 1941.

2. Letter written to Hon. Robert L. Doughton, Chairman, Committee on Ways and Means, House of Representatives, Washington, D. C. by Marvin Jones, Administrator, War Food Administration; approving H. R. 1033 a bill designed to admit shredded coconut meat into the United States free of duty.

War Food Administration,
Washington, November 2, 1943.

Hon. R. L. Doughton,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, D. C.

Dear Bob: Reference is made to your letter of October 12 requesting our comments and recommendations with respect to H. R. 1033, a bill to suspend the effectiveness during the existing national emergency of the import duties on coconuts and coconut meat.

The trade agreement with the United Kingdom reduced by 50 percent the duty on coconuts, but left unchanged the duty on coconut meats. The principal normal peacetime sources of supply, such as the Philippines, are no longer available to us by reason of the war.

It is our understanding, from informal discussions, that the proposed legislation is intended to increase somewhat imports of coconuts and coconut meats, particularly the latter, for use in

shredded or grated form in foods and confections. Prospective supplies are principally in Central America and the Caribbean.

In view of our desire to increase the over-all food supply, the War Food Administration sees no objection to the passage of this legislation, since its application is limited to the wartime emergency.

The Bureau of the Budget advises that it has no objection to the submission of this report.

Sincerely yours,

Marvin Jones, Administrator

3. Cuban Reciprocal Trade Agreement of August 24, 1934, and subsequent amendments thereto (T. D. 47232) (R. 240) (66 T. D. 189)

The President of the United States of America and the President of the Republic of Cuba, desirous of strengthening the traditional bonds of friendship and commerce between their respective countries by maintaining as the basis for their commercial relations the granting of reciprocal preferential treatment, * * *:

Article XIV

Laws, regulations of administrative authorities, and decisions of administrative or judicial authorities, pertaining to the classification of articles for customs purposes and to rates of duty shall be published promptly in such a manner as to enable traders to become acquainted with the * * *

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